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No. 99-498

In The

Supreme Court of the United States

MICROSOFT CORPORATION, *et al.*,

Petitioners,

vs.

DONNA VIZCAINO, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 1996 and 1997, the Ninth Circuit ruled twice, by a panel and *en banc*, on the construction and enforcement under Washington State law of Microsoft's employee stock purchase plan (ESPP), a discount-price stock purchase plan under IRC § 423 (not an ERISA plan). The Ninth Circuit determined, with respect to a certified class of common-law employees of Microsoft, that they were wrongly excluded from the ESPP. It held that, under the Washington common law of contracts, all common-law employees of Microsoft should be allowed to purchase shares at a discount, despite being required by Microsoft to sign forms incorrectly stating they were not eligible. *Vizcaino I*, 96 F.3d 1187 (9th Cir. 1996) (panel); *Vizcaino II*, 120 F.3d 1006 (9th Cir. 1997) (*en banc*). Microsoft previously sought review by this Court of the merits of the Washington law issues, saying these *Vizcaino I* and *II* decisions were contrary to Washington law. This Court denied certiorari. 118 S.Ct. 899 (1998).

Following remand, the district court, acting *sua sponte*, substantially decertified the class by reducing it to a tiny "sliver" of the former class, *i.e.*, those hired before April 1, 1990. The district court ruled that thousands of other common-law employees of Microsoft who were within the original *stipulated* class definition, and who were eligible to participate in the ESPP under the Ninth Circuit's 1996-97 decisions, now had to *individually* pursue their identical ESPP claims, either by mass interventions in this case or by separate actions.

QUESTIONS PRESENTED – Continued

Upon a petition for mandamus, the Ninth Circuit reversed and enforced its prior mandate, ruling that the district court's substantial decertification of the class after the class prevailed on the merits was contrary to the Ninth Circuit's mandate and contrary to Rule 23(c)(1). *Vizcaino III*, 173 F.3d 713 (9th Cir. 1999). Microsoft again sought rehearing *en banc* by the Ninth Circuit. This time, rehearing was denied without a single vote for rehearing. *Not even the dissenters from the 1996-97 Ninth Circuit decisions on the merits voted for rehearing.* 184 F.3d 1070. Microsoft now petitions for certiorari a second time.

This case does not involve any split in the circuits, any substantive issue of federal law, or any new principles of law. Microsoft simply contends the Ninth Circuit *misapplied* certain well-established procedures and that it misunderstood its own prior decisions on Washington contract law. Thus, the questions presented here are these:

Whether this Court should review Microsoft's argument that the court of appeals misunderstood the scope of its own prior mandate and its own prior decisions on matters of Washington State law – issues which this Court previously declined to review on the merits – and thus whether the court of appeals abused its discretion in enforcing the prior mandate by way of mandamus rather than waiting for another appeal.

Whether, even if the court of appeals misinterpreted its mandate and its own prior decisions on the merits of Washington State law issues, this Court should review

QUESTIONS PRESENTED – Continued

Microsoft's argument that the court of appeals also abused its discretion in holding that the district court erred in its *sua sponte* drastic reduction of the class to a "sliver" of its former size, where this would result in *thousands* of identical claims on the same issues of Washington law resolved in the Ninth Circuit's prior decisions, and in ruling that the district court should not have altered the class definition after the appellate "decision on the merits" under Rule 23(c)(1).

Whether this Court should review Microsoft's argument that the court of appeals erred in reiterating its previous mandate under principles of Washington State common law pursuant to *Erie Railroad v. Tompkins* and Microsoft's argument that the court of appeals should instead have created and applied some sort of federal common law to override Washington common law, to somehow provide in advance for "orderly resolution" of unspecified, possibly similar, arguments in two pending federal district court ERISA cases in Los Angeles and New York.[1]

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[1] These two cases are cited in the Pet., p. 4 and n. 2.

LIST OF PARTIES

The petition lists the named parties. In addition, in 1993 the parties agreed to, and the district court certified, a class. Pet. A89, n. 1. The plaintiffs and members of the court-certified class are collectively referred to herein as the "Workers" (A48-A49).

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinions are reported at 97 F.3d 1187 (9th Cir. 1996) (Pet. A86), *on rehearing*, 120 F.3d 1006 (9th Cir. 1997) (*en banc*) (Pet. A47), *cert. denied*, 118 S.Ct. 899 (1998), *enforced by mandamus*, 173 F.3d 713 (A4), *amended and rehearing en banc denied*, 184 F.3d 1070 (9th Cir. 1999) (A1).

There were also two pertinent district court orders which are not in the petition's appendix. On Dec. 4, 1998, the district court, Judge John C. Coughenour, ordered that individuals who were formerly, but no longer, class members because of the class reduction orders of Judge Carolyn Dimmick (Pet. A25, A33) could *individually* intervene in this case, raising the prospect of this case having *over one thousand individual plaintiffs* instead of simply continuing as a class action. Petition, p. 10 n. 6. Similarly, Microsoft relies (Pet. 11 and n. 8) on one sentence from a partial *dissenting opinion* in *Vizcaino II* at 1018-19 (Pet. A75), for an argument that *Vizcaino III* was wrong. The district court explicitly and correctly rejected Microsoft's previous argument that this statement in a *dissent* was part of the mandate. CR 307, Order (by Judge Dimmick), 1998 WL 122084 at 2-4.

RULE INVOLVED

Rule 23(c)(1), FRCP, states:

> As soon as practicable after the commencement of an action brought as a class action, the

court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits.

STATEMENT OF THE CASE

Microsoft's discussion of the facts and the proceedings below is replete with errors and statements of fact with *no* basis in the record. For example, Microsoft contends it neither agreed to the scope of the class here nor did it agree that the class members "generally were common law employees of Microsoft" (Pet., p. 14 and n. 9; see also pp. 16-18), despite numerous judicial findings to the contrary.[2] Microsoft contends that the Ninth Circuit misstated Microsoft's various concessions in 1993-94 on those matters (Pet., p. 14, n. 8) and that "the Magistrate Judge's finding was *rejected* by the District Court prior to the appeal that resulted in the *Vizcaino I* decision" (*id.*, emphasis by Microsoft). In fact, the district court *did not* reject the magistrate judge's finding since *this matter was never presented to the district court by Microsoft* because *Microsoft expressly agreed* to the magistrate judge's findings.[3] The district court later specifically found that

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[2] *Vizcaino I* at 1190 n. 1 (p. A89 n. 1); 1193 n. 4 (p. A96 n. 4); 1195 n. 9 (p. A101 n. 9): *Vizcaino II* at 1010 (p. A53); 1010 (p. A54); 1011 (p. A57); 1012 (p. A58); 1013 (p. A61); *Vizcaino III* at 720 (p. A13, A14).

[3] The magistrate judge said (CR 187 at 34):

Microsoft does not really contend at this point that Plaintiffs were not "common law employees," as

(Continued on next page)

Microsoft had conceded these points. 1998 WL 122084 at 3.[4] Thus, the Ninth Circuit said "Microsoft's

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> found by the IRS for tax purposes, and such a contention, were it to be made, would fly in the face of all of the material facts concerning Plaintiffs' work at Microsoft, the existence of which Microsoft acknowledges.

Microsoft limited its objection to the magistrate judge's recommendation as follows (CR 195 at 2):

> This objection rests on one simple basis. The Plaintiffs' claim for ESPP participation is governed by state contract law. And there was never a contract, express or implied, between Microsoft and the Plaintiffs that entitled them to ESPP participation. . . .
>
> > *Defendants do not object to the factual findings embodied in the Report and Recommendation.* (Emphasis added.)

Under FRCP 72(b), a party's "failure to object to a magistrate's findings of fact waives the right to contest those findings on appeal." *Britt v. Simi Valley Unified School Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

[4] The district court found (1998 WL 122084 at 3):

> It is clear that Microsoft conceded that "plaintiffs" were common law employees at a number of stages in this case, beginning in 1994, on its motion for summary judgment on the SPP. See Doc. 130 at 4. While Microsoft may have made this concession merely for the sake of argument, it had the potential to backfire when made elsewhere. For example, in responding to plaintiffs' motion for summary judgment on the ESPP, Microsoft indicated it would not contest the status of plaintiffs as common-law employees. Doc. 152 at 9 n. 6. Magistrate Judge Wilson clearly understood Microsoft's position as such, and recommended a partial verdict for plaintiffs

(Continued on next page)

argument . . . that its earlier concession regarding the common-law employee status of the members of the class was merely arguendo, is without merit. Not only did Microsoft stand by this concession throughout the litigation but the district court also found it was supported by the facts and ruled that Microsoft continued to be bound by it." *Vizcaino III* at 722 (A18).

Microsoft inaccurately asserts that the "named plaintiffs worked for Microsoft between 1987 and 1990; they were classified and treated as independent contractors by Microsoft, and performed a variety of jobs." Pet., p. 6. Microsoft then uses its inaccurate statement regarding the facts of the named plaintiffs to support its argument that "[t]he district court properly excluded from the class the new generation of temporary workers [hired after the so-called "conversion" in April 1990] who had not worked for Microsoft in an independent contractor capacity during the pertinent time period, because the named plaintiffs are not representative of such people." Pet., p. 15.

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in reliance thereon. See Doc. 187 at 30 (indicating that plaintiff employee status was dispositive); id. at 34 (indicating that defendant did not and could not logically contest their employee status). Judge Wilson assumed pre- and post-conversion claims were at issue, id. at 6, 11-12, and defendant did nothing to challenge that assumption.

More important, Microsoft conceded to the Ninth Circuit that plaintiffs were common-law employees, and again did not qualify that concession as applying only to pre-conversion workers. See *Vizcaino II*, 120 F.3d at 1010; *Vizcaino I*, 97 F.3d at 1193 n. 4.

The actual record facts in the district court and court of appeals contradict Microsoft's assertion.

The class representatives in *Vizcaino I, II,* and *III* included Workers employed at Microsoft and both misclassified as "independent contractors" and assigned to third-party "temporary" agencies.[5] It included those at Microsoft *prior* to Microsoft's "conversion" process (*i.e.*, prior to April 1, 1990), and those who worked at Microsoft *after* the 1990 "conversion."[6] The class definition explicitly referred to Workers called employees of "third-party employment agencies." Pet., p. A89 n. 1. Five of the eight *original* class representatives were paid by Microsoft

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[5] In 1994 the magistrate judge said that Microsoft's term "freelancers" means "persons working at Microsoft in either 'independent contractor' or 'temporary agency employee' statuses, who did not receive employee benefits." CR 187, p. 4. This definition was before the court of appeals in *Vizcaino I* and *II*. Similarly, Microsoft told the court of appeals in *Vizcaino I* and *II* (Appellees' Brief, No. 94-35770, p. 1):

> Microsoft has supplemented its regular employees with individuals identified as "freelancers." All of the plaintiffs were classified by Microsoft (and considered themselves) as "freelancers," rather than "regular employees." ER 91-92. *"Freelancers" were persons working at Microsoft in either "independent contractor" or "temporary agency employee" categories, who did not receive employee benefits.* [Emphasis added.]

[6] In April, 1993, Microsoft described the class representatives as "eight individuals who, *during various periods of time between 1987* and the present [*i.e.*, April 1993]," provided "services to Microsoft . . . in positions categorized as freelancers and/or temporary agency personnel." CR 23, p. 2 (emphasis added). There was *no* limitation to those hired before April, 1990.

through third-party agencies *after* April 1, 1990.[7] Furthermore, class representative Jon Waite was originally employed at Microsoft as an "independent contractor" in 1988. CR 9, ¶3. Mr. Waite left Microsoft in 1989, only to be rehired by Microsoft into a different job in August, 1992 and he worked for Microsoft while paid through third-party agencies until he was reclassified as a Microsoft "headcount" employee on April 5, 1993. CR 9 ¶5, 6; CR 90 ¶¶25-27, 31.

All of this information concerning the class representatives' post-1990 employment and employment through third-party agencies was before the district court when the class was certified in 1993, before the court of appeals in *Vizcaino I* and *II*, and before this Court when it denied review in 1998.

Similarly, Microsoft contends (Pet., pp. 11, 26) that the Ninth Circuit should not have decided, "as a matter of law" and "without [a] factual record," that Microsoft, during the course of this case, continued its practice of assigning its own common-law employees to the payroll of "temp" or "payroll service" agencies (a practice known as "payrolling"). See *Vizcaino I* at 1191 (p. A91); *Vizcaino III* at 716 (p. A6). In fact, the *uncontroverted* factual record before the Ninth Circuit in *Vizcaino III* showed that Microsoft had, during this litigation, continued and expanded the same practices that originally resulted in this case and which were discussed in the prior *Vizcaino I* and *II* decisions. Pl. Reply, 9th Cir. No. 98-71388, pp.

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[7] CR 9, ¶¶5-6; CR 11, ¶3; CR 12, ¶3; CR 13, ¶3; CR 14, ¶3.

24-25; CR 345, 349-57. Microsoft simply failed to controvert plaintiffs' evidence on summary judgment.

The 1993 Class Certification

This case was filed as a class action, seeking *inter alia*, prospective injunctive relief. CR 2, ¶16. A class was certified pursuant to FRCP 23(b)(1) and (b)(2), specifically because prospective injunctive relief was sought. CR 47, p. 11. On July 21, 1993, the Court certified a class "for all issues remaining in the case," defined as follows (Pet., p. A89 n. 1):

> All persons employed by the Microsoft Corporation in the United States who are denied employee benefits because they are considered independent contractors or employees of third-party employment agencies, but who meet the definition of employees of Microsoft Corporation under the common law. The definition includes *all* such persons [not limited to those hired after April, 1990] so employed within the applicable statute of limitations. [Emphasis added.]

Expecting to win, and hoping to achieve a broad *res judicata* effect for strategic purposes, Microsoft conceded the correctness of this class definition in the district court and on appeal. *Vizcaino I* at 1190 n. 1 (A89); CR 23, pp. 3, 6. *Microsoft itself acknowledged*, in the class certification briefing in 1993, *prior* to *Vizcaino I* and *II*, *that the class "is not restricted to free lancers or to those with respect to whom determinations [i.e., IRS determinations or Microsoft reclassifications] have been made."* CR 23, p. 4 n. 2

(emphasis added). Accordingly, the entire class of misclassified workers was before the Court in *Vizcaino I* and *II*, not just those who were *personally* "reclassified" or "converted" by Microsoft in 1990.[8]

The magistrate judge who initially considered plaintiffs' claims concluded that Microsoft's incorporation of IRC § 423 into the ESPP meant, as a matter of Washington law, that the ESPP must be extended to all Microsoft common-law employees. *Vizcaino I* at 1191-92, 1197 (A93, A105-A108). The district court disagreed and dismissed the case.

1996-97 Ninth Circuit Decisions Concerning the ESPP

On appeal, *Vizcaino I* explained that the ESPP itself required that it *shall be construed* in accordance with IRC § 423 and this contract construction requirement is part of the contract under Washington law. The ESPP stated (A106):

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[8] The words "IRS-reclassified" and "Microsoft-converted" were neither in the original 1993 class definition, nor even suggested by any party or the district court at the time of class certification. The original class definition also did not require "continuous" employment since 1990 at Microsoft; indeed, the terms of the ESPP itself do not require "continuous" employment. The 1993 class definition also states the class includes *all* persons "so employed within the applicable statute of limitations" (A89 n. 1). Nevertheless, the district court, after remand, imposed *all* of these limitations on class membership. A28, A41-A45. This effectively, as the district court stated, reduced the class to a small "sliver" of the class that previously numbered in the "thousands." A37, A38 n. 3.

> It is the intention of the Company to have the Plan qualify as an "employee stock purchase plan" under Section 423 of the Internal Revenue Code of 1954. *The provisions of the Plan shall, accordingly, be construed so as to extend and limit participation in a manner consistent with the requirements of that Section of the Code.* [Emphasis *by the Court.*]

Vizcaino I held (pp. A106-A113) the ESPP is an offer to all common-law employees of Microsoft who meet the ESPP's eligibility rule incorporating IRC § 423 (*id.* at A106-A107):

> . . . Because the term "employees" in § 423 is construed to refer to "common-law employees," the ESPP, when construed in a manner consistent with the requirements of § 423, extends participation to *all common-law employees* not covered by one of the express exceptions set forth in the plan. Accordingly, *we find that the ESPP, through its incorporation of § 423, expressly extends eligibility for participation to the plaintiff class and affords them the same options to acquire stock in the corporation as all other employees.* [Emphasis added and footnotes omitted.]

The *Vizcaino I* panel also concluded (A109):

> Although Microsoft may have generally intended to exclude individuals who were in fact independent contractors, it could not, consistent with its express intention to extend participation in the ESPP to *all common-law employees,* have excluded the Plaintiffs. Indeed, *such an exclusion would defeat the purpose of including § 423 in the plan, because the exclusion of common law employees not otherwise excepted would*

> *result in the loss of the plan's tax qualification.* [Emphasis added.]

Following the panel decision, the *en banc* Ninth Circuit further stated that Microsoft managers could not exclude the plaintiff class from the ESPP, as a matter of corporate law and contract law (*Vizcaino II* at 1010-11, A63-A65):

> *The ESPP was created and offered to all employees, the Workers knew it, even if they were not aware of its precise terms, and their labor gave them a right to participate in it.* Of course, Microsoft's officers would not allow that participation because they were under the misapprehension that the board and the shareholders had not extended the offer to the Workers. That error on the officers' part does not change the fact that there was an offer, which was accepted by the Workers' labor. Of course, the ESPP provides for a somewhat unusual benefit. An employee, who chooses to participate, must pay for any purchase of stock, and the Workers never did that. We, however, leave the determination of an appropriate remedy to the district court. [Emphasis added; footnote omitted.]

Thus, the Ninth Circuit held in *Vizcaino I* and *II* that Microsoft could not exclude any of its common-law employees from participating in the ESPP without violating the explicit terms of the ESPP and the dictates of Microsoft's shareholders. This was the mandate of the appellate court.

Microsoft sought review by this Court of the merits of these ESPP issues governed by Washington law, as

decided in *Vizcaino I* and *II*, arguing that the Ninth Circuit misapplied Washington law. This Court denied certiorari. 118 S.Ct. 899 (1998).

Proceedings After Remand

Following remand, the district court first decided whether the *Vizcaino* mandate "applies to the entire plaintiff class [both pre-conversion and post-conversion] or only a specific part of it." CR 307, p. 1; 1998 WL 122084, p. 1. In rejecting Microsoft's contention that *only* "pre-conversion" (*i.e.*, pre-1990)[9] claims had been before the Court in *Vizcaino I* and *II*, the district court correctly concluded that "*the mandate* [of the Court of Appeals] *applies to all plaintiffs who were common-law employees, and all periods in which they were common-law employees.*" 1998 WL 122084 at 4 (emphasis added).

Later, in a Microsoft district court reply on its motion to amend class certification (to which plaintiffs were allowed no response), Microsoft included a footnote suggesting the district court should *sua sponte* redefine the class. CR 407, p. 12 n. 10. Without briefing or oral argument, the district court then, *sua sponte*, redefined and drastically reduced the class on July 15, 1998 (almost five

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[9] "Conversion," in Microsoft's terminology, was its process in 1990 of turning misclassified "independent contractors" into either recognized "headcount" employees or assigning them to become "payroll service" or "temporary agency" employees. *Vizcaino I* at 1191 (A91). The named plaintiffs were employed before and after "conversion" and/or were re-hired after "conversion."

years to the day after the original class certification) as follows (A28):

> This case has always been about a particular group of Microsoft workers who share distinct circumstances with the named plaintiffs. The group consists of all Microsoft workers who, like all the named plaintiffs, worked as independent contractors between 1987 and 1990 and whose positions were reclassified as employee positions after the IRS reviewed them. This case, as the Court found in its order on the scope of remand in February, includes the claims brought by the same workers for their work after 1990, when many of them, including four named plaintiffs, were transferred to temporary employment agencies. This is the scope of the plaintiff class.
>
> *Other groups of potential claimants, those who have worked for Microsoft in a non-employee capacity, but were not reclassified by the IRS or converted by Microsoft*, have never, as a practical matter,[10]

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[10] Plaintiffs' facts (rather than facts of unnamed putative class members) were before the district court as a "practical matter" because liability in this class action was, as is normal in a class action, litigated primarily on the named plaintiffs' facts. Therefore, it was incorrect that a substantially reduced class was permitted because "the [revised] definition conforms to the *facts Plaintiffs presented* to the Court." CR 488, p. 4 (emphasis added). Microsoft correctly stated "this is a *class* action" and "[a]bsent class members are not active participants in this action." *Id.*, p. 19 (emphasis by Microsoft). Indeed, Microsoft specifically objected to consideration of factual situations of any Workers other than the named plaintiffs "because the essence of a class action is that it is litigated based upon the facts presented by the representatives of a certified class." CR 376, p. 10.

> *been involved in this case. At this time, they remain outside the plaintiff class.* [Emphasis added.]

The district court's class redefinition thus imposed major new limitations upon class membership that were never in the original 1993 stipulated class definition, *i.e.*, it added requirements that each class member be hired before April 1, 1990, and also be either "reclassified" by the IRS or "converted" by Microsoft. The district court thereby excluded the vast majority of original class members from participating in the fruits of the victory won by the class in *Vizcaino I* and *II*. The excluded workers were thus forced to pursue many *individual* claims, potentially *thousands*, by mass interventions in this action or by separate lawsuits. CR 553; Pet., p. 10 n. 6. Creation of such obstacles to relief effectively rewarded Microsoft for continuing and expanding its breach of the ESPP contract after this lawsuit began.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT'S DISCRETIONARY USE OF MANDAMUS IN WHAT MICROSOFT AGREES IS ITS "TRADITIONAL" FUNCTION – "TO ENFORCE THE LAW OF THE CASE" – CANNOT BE A DEPARTURE FROM "THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS" AND, CONSEQUENTLY, DOES NOT COMPEL THE "EXERCISE OF THIS COURT'S SUPERVISORY POWER" TO REVIEW WHETHER THE NINTH CIRCUIT MISUNDERSTOOD ITS OWN PRIOR MANDATE UNDER WASHINGTON LAW.

Microsoft agrees that a "traditional office of mandamus is to enforce the law of the case doctrine" and make sure a lower court carries out a decree by a higher court in the same case. Pet., p. 21, citing *In re Blake*, 175 U.S. 114, 117 (1899), and *Sibbold v. United States*, 37 U.S. 488, 492 (1838). This is precisely what occurred here. Pet., p. 3; *Vizcaino III* at 719-20 (A11-A12).

Microsoft also agrees that issuance of a writ is a matter within the appellate court's discretion. *Id.* at 719-20 (A12), citing *Kerr v. U.S. District Court*, 426 U.S. 394, 403 (1976). Microsoft thus must show that the Ninth Circuit so thoroughly misunderstood its own mandate that it abused its discretion and it went "so far" beyond the "accepted and usual course of judicial proceedings" as to compel both this Court's review and this Court's independent construction of the Ninth Circuit's prior mandate (Pet., p. 22 and n. 10), even though review of the *substance* of that prior Ninth Circuit mandate was previously denied by this Court, 118 S.Ct. 899 (1998).

Here, the Ninth Circuit in *Vizcaino III* carefully reviewed the scope of its prior mandate (A14):

> The class certification is a central premise of both [prior] opinions. Thus, in *Vizcaino I*, the panel relied on the Magistrate Judge's finding that "Microsoft conceded the fact that the named plaintiffs and the class they represent generally were common law employees" and that Microsoft "reserved only the right to object to the employment status of particular plaintiffs during certain periods of their tenure with Microsoft." 97 F.3d at 1193 n. 4. It went on to "hold that the named plaintiffs and the class they represent are covered by the specific provisions of the ESPP." *Id.* at 1197. In *Vizcaino II*, the en banc court states that "the ESPP must, essentially, be made available to all employees" and "[t]he ESPP was created and offered to all employees." 120 F.3d at 1011, 1014. And the class is an integral element of the mandate which remanded "for the determination of any questions of individual eligibility for benefits that may remain following issuance of this opinion and for calculation of the damages or benefits due the various class members." *Vizcaino I*, 97 F.3d at 1200; see also *Vizcaino II*, 120 F.3d at 1015 ("Any remaining issues regarding the rights of a particular workers in the ESPP and his available remedies must be decided by the district court upon remand."). Thus, the district court's statement that this case is about a particular group of Microsoft employees who share "distinct circumstances" is unfounded.

Thus, the Ninth Circuit held in *Vizcaino III* that in *Vizcaino I* and *II* the district court was instructed that "all employees" of Microsoft (as "employee" is defined in the

common law) are entitled to participate in the ESPP, by the terms of the ESPP itself, as construed under Washington State law. *Vizcaino III* at 720-21 (A14). The court of appeals further held *in Vizcaino III* that *"the class* [as originally defined] *is an integral element of the mandate"* in *Vizcaino I* and *II* (A14, emphasis added).

Microsoft only slightly quibbles with the correctness of the Ninth Circuit's explanation of its own prior decisions and mandate. It contends the Ninth Circuit did not expressly limit the district court's authority to substantially decertify the class in its remand for the district court's "determination of any questions of individual eligibility for benefits" and its calculation of amounts due these individuals. Pet., pp. 21-22. It does not dispute, however, that the mandate includes both matters explicitly *and* implicitly decided. *E.g., Firth v. U.S.*, 554 F.2d 990, 994 nn. 3-4 (9th Cir. 1977); *In re Chambers Development Corp.*, 148 F.3d 214, 224 (3d Cir. 1998).

Microsoft maintains the mandate of *Vizcaino I* and *II* is not "obvious" and therefore it scolds the Ninth Circuit for deciding the question of the district court's compliance with those prior decisions and mandate by way of mandamus instead of by an eventual appeal. Pet., p. 22. Of course, such an appeal would occur only long after the harm addressed in *Vizcaino III* had already occurred – *i.e.*, former class members who had prevailed on appeal in *Vizcaino I* and *II* were being forced to pursue thousands of individual claims to win the same relief they had previously won on appeal as class members.

There was no abuse of discretion by the Ninth Circuit in utilizing the mandamus procedure to enforce its own

prior mandate since, Microsoft agrees, this is a traditional and proper function of mandamus.[11] Pet., p. 21. Furthermore, the Ninth Circuit did not misunderstand its own

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[11] Whether the court of appeals should have exercised its mandamus power does not present a compelling issue for this Court's review for two additional reasons. First, the mandamus petition in *Vizcaino III* was consolidated with an appeal of the district court's denial of a permanent injunction (Pet., pp. A9-A10). The court of appeals undisputedly had jurisdiction over the permanent injunction appeal. 28 U.S.C. § 1292(a)(1). An injunction appeal brings up for review any underlying matters "inextricably intertwined" with the injunction order from which the appeal is taken. *Thornburgh v. Amer. College of Obs. and Gyn.*, 476 U.S. 747, 755-57 (1986) (court of appeals reviewing district court's ruling on preliminary injunction properly reviewed merits as well); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940) (court of appeals reviewing order granting preliminary injunction also had jurisdiction to review order denying motions to dismiss). The district court denied plaintiffs' application for a permanent injunction primarily because class members excluded by the district court's class redefinition order had not yet "prevailed." Pet., pp. A9-A10. Thus, the correctness of the class redefinition was before the court of appeals in the injunction appeal and that court would have been required to address these same issues in that appeal regardless of whether it exercised its mandamus powers. *Vizcaino III* explained (A24): "[b]ecause our opinion also disposes of the issues raised in plaintiffs' appeal from the denial of a permanent injunction, we DISMISS that appeal without prejudice." Accordingly, even if the court of appeals had abused its discretion in exercising its mandamus powers, plaintiffs' permanent injunction appeal involving the same issues would still need to be decided by that court.

Second, this sort of procedural issue may no longer arise since FRCP 23(f) was amended effective Dec. 1, 1998 to allow interlocutory review of certain class certification rulings. This amended rule was not in effect until after the district court's 1998 rulings were entered and the mandamus petition filed.

prior mandate and there was no departure from the accepted course of judicial proceedings that compels review by this Court. Indeed, the Ninth Circuit was entirely correct in enforcing its own prior mandate and *not even the dissenters* on the merits from the prior mandate in *Vizcaino I* and *II* voted to rehear the *Vizcaino III* enforcement order. 184 F.3d 1070.

II.

THE NINTH CIRCUIT APPLIED ESTABLISHED PRINCIPLES UNDER RULE 23(c)(1) IN HOLDING THAT THE DISTRICT COURT SHOULD NOT HAVE SUBSTANTIALLY DECERTIFIED A CLASS AFTER THE CLASS PREVAILED IN TWO NINTH CIRCUIT DECISIONS ON THE MERITS UNDER WASHINGTON STATE LAW.

Microsoft contends the Ninth Circuit made "a significant misapplication of Rule 23" and it thus abused its discretion in preventing Microsoft from repudiating its previous explicit waiver of any dispute over the class definition.[12] Pet., pp. 13-20. Because the Court does not review alleged "misapplication[s]" of established principles of civil procedure, S.Ct. Rule 10, Microsoft must demonstrate with "compelling reasons" that the alleged "misapplication" of Rule 23 in the decision below was such an extraordinary departure "from the accepted and usual course of judicial proceedings . . . as to call for an

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[12] Microsoft argues "it was error here to forbid the district court" from changing the class on remand even though, "at the very outset of this action, the parties may have agreed" on the class definition. Pet., p. 15.

exercise of this Court's supervisory power." S.Ct. Rule 10(a). Microsoft makes no such showing of "compelling reasons" for review; indeed, the decision below was completely consistent with all relevant authorities.

First, Microsoft argues that all class certification orders are inherently "provisional" and may be changed "at any time before final judgment," even *after* a decision "on the merits," as there was here. Pet., pp. 16-17. The Ninth Circuit rejected Microsoft's position, following the precise language of Rule 23, which provides a class certification "may be altered or amended *before the decision on the merits.*" Rule 23(c)(1) (emphasis added). The Ninth Circuit, following other circuits, held that a class-wide appellate decision "on the merits" of liability issues, leaving only "questions of individual eligibility" and calculations of amounts due, is a "decision on the merits" within Rule 23(c)(1) even though such individual calculations may remain at issue until final judgment under Rule 23(c)(3).[13] *Vizcaino III* at 721 (A15-A16) explained:

> Rule 23(c)(1) permits a certification order to be altered or amended "before the decision on the merits," not afterward. See *Scott v. City of Anniston*, 682 F.2d 1353, 1357 (11th Cir. 1982)

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[13] Microsoft cites (Pet., p. 17) authorities indicating that a class may be decertified in a few situations, *e.g.*, 5 *Newberg on Class Actions* § 24.71, pp. 24-228 to 229 (3d ed. 1992), where the plaintiffs turned out to have a conflict of interest or otherwise were inadequate representatives. In such cases, the class should not be bound by *res judicata*. Here, the representative plaintiffs were not only "adequate," they were successful. There could be no basis for the district court to deny *Vizcaino I* and *II* class members the fruits of their class-wide victory in the Ninth Circuit based on "adequacy" of the representation.

> (ruling that appellate decision finding evidence sufficient to make prima facie case and insufficient to sustain proferred defense and remanding for further proceedings as to individual class members' damages was a "decision on the merits" precluding subsequent class modification under Rule 23(c)(1); *Jimenez v. Weinberger*, 523 F.2d 689, 697 (7th Cir. 1975) (holding that Rule 23(c)(1)'s "explicit permission to alter or amend a certification order before decision on the merits plainly implies disapproval of such alteration or amendment thereafter"). This court's prior decision adjudicates the merits of the plaintiff class' claim, leaving only "questions of individual eligibility for benefits that may remain . . . and calculation of the damages or benefits due the various class members." *Vizcaino I*, 97 F.3d at 1200.

Second, Microsoft quarrels with the Ninth Circuit's account of the proceedings, contending (Pet., p. 14) the Ninth Circuit was wrong in finding (*Vizcaino III* at 721, A16) that Microsoft had conceded the commonality and typicality issues it argues now and it was wrong (Pet., pp. 17-18), in finding (*Vizcaino* III at 722, A18) that Microsoft agreed the Workers are generally common-law employees of Microsoft, with potential individual exceptions. These findings are more than amply supported by the record, as explained by the court of appeals.

Moreover, the Ninth Circuit pointed out Microsoft's hypocrisy on this matter. Microsoft maintains the 1994 decisions of the district court *in favor of Microsoft* which were not appealed (and thus were not reversed) may not be relitigated by the original class. CR 363 at p. 5. *Vizcaino III* explained that Microsoft cannot have it both ways,

claiming the benefits of a class-wide decision *for Microsoft* while denying any effect to the class-wide decision of the Ninth Circuit *against Microsoft* (at 720, A13):

> [If Microsoft had won on all the issues and] the judgment had not been reversed, it would have been preclusive as to all the workers now excluded from the class under the district court's revised class certification. Were the case before us now in that posture – i.e., had this court affirmed rather than reversed – there is little doubt what Microsoft's position would be as to who is included in the class. Microsoft's argument that the scope of the class was not material to the issue on appeal is not tenable for that reason alone – substantial rights were at issue for all the members of the certified class.

Third, Microsoft contends that the district court was correct in substantially decertifying and drastically reducing the class because this made sure the class was represented "appropriately" and "adequately." Pet., p. 19. There are, however, only various *immaterial* differences between the remaining "sliver" of the class and the much larger excluded part of the former class, basically (1) the particular years they worked and (2) whether *Microsoft*, in retrospect, *admitted* they were in the class.[14] These

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[14] The latter point – "Microsoft's admissions" – was emphasized by the district court (p. A44). Accordingly, the district court effectively limited the plaintiff class to only those Microsoft still *agreed on*, thereby excluding from the class many who had prevailed on appeal *against Microsoft* because Microsoft did not agree, pp. A44-A45. To limit the class, after

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"distinct circumstances" (Pet., p. 19 and A28) had no relationship whatsoever to the class claims or their entitlement to benefits. Class certification under Rule 23 is based upon common claims and common questions of law and fact, not on *identical* facts. FRCP 23(a); see, *e.g., In Re Prudential Ins. Co. of Am. Sales Prac. Lit.*, 148 F.3d 283, 311 (3d Cir. 1998); *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993). The existence of non-material factual differences does not preclude class certification in the first instance, and it is even less reason for substantial decertification of an existing class that already prevailed on the merits. Rule 23(c)(1). Moreover, the district court did not give notice to the class of the possibility of decertification before the class definition was changed and it refused to give the larger excluded part of the class an opportunity to add "appropriate" additional class representatives. CR 553.

Finally, Microsoft raises a point that it never presented to the district court or the Ninth Circuit and therefore could not be appropriate for review by certiorari, *i.e.*, that class members should have "been given individual notice of the action [and] the opportunity to opt out of the class." Pet., p. 19, *citing Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), and *Ortiz v. Fibreboard Corp.*, 119 S.Ct. 2295, 2313 (1999). This is, however, as Microsoft expressly *agreed* in 1993, a class action under Rule 23(b)(1)(A) and (b)(2) and these categories are

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success on the merits, to only those the defendants "admits" should prevail is not consistent with the district court's responsibility to protect the class. *Deposit Guar. National Bank v. Roper*, 445 U.S. 326, 331 (1980).

undisputedly appropriate in light of plaintiffs' pending request for injunctive relief (A9-A10, A18-A19, A24). This was *not* a Rule 23(b)(3) "opt-out" class action. Moreover, Microsoft itself successfully *opposed* giving any notice about this case to the class in the district court. CR 57.

Ortiz was certainly correct in holding that a Rule 23(b)(3) "opt-out" class action could not be converted into a Rule 23(b)(1)(B) mandatory class action through a settlement by the parties which arbitrarily established a "limited fund" by simply agreeing to a "limited" settlement amount. This class here, however, is not a settlement class, nor is this a "limited fund" case. Due to the need for declaratory and injunctive relief, this is properly a class action under Rule 23(b)(1)(A) and (b)(2). Microsoft does not argue otherwise.

Moreover, the district court here did *not* give thousands of class members a chance to *"opt out."* Rather, *it simply expelled them* from the class without giving them notice, and without providing any chance to propose new class representatives as Microsoft itself had suggested (CR 407 at p. 8).[15] Moreover, the district court ruled that thousands of workers who had been in the original class that prevailed in the Ninth Circuit must *individually* intervene or file new lawsuits to pursue the *same* claims on which they had, as class members, already prevailed in the Ninth Circuit. A9; CR 553.

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[15] The district court denied plaintiffs' request to name additional class representatives who were working in the period from 1989-98 in positions covered by the original class definition. *Vizcaino III* at 718 (A9).

Thus, the Ninth Circuit's *Vizcaino III* decision is not such a "far" departure from "the accepted and usual course of judicial proceedings" as to compel the "exercise of this Court's supervisory power," S.Ct. Rule 10(a), nor is it in conflict with any other circuits on the application of Rule 23(c)(1) to appellate decisions on the merits in favor of class. It is also completely consistent with numerous decisions holding similar claims are certified as class claims under Rule 23(b)(1)(A) and (b)(2). Finally, the Ninth Circuit was entirely correct, on the record in this case, in finding that Microsoft repeatedly waived any dispute concerning the class certification.

III.

THE NINTH CIRCUIT'S THREE DECISIONS IN *VIZCAINO I, II* AND *III* ARE ALL BASED ON WASHINGTON STATE COMMON LAW PRINCIPLES, THIS COURT ALREADY DENIED CERTIORARI ON THE MERITS OF THOSE STATE LAW ISSUES IN 1998, AND MICROSOFT'S EFFORTS TO PROMOTE SOME SORT OF FEDERAL COMMON LAW TO OVERRIDE WASHINGTON'S COMMON LAW OF CONTRACTS SHOULD BE REJECTED PURSUANT TO *ERIE RAILROAD V. TOMPKINS*.

This Court does not review the application of issues of state law which a petitioner may contend were wrongly decided by the court of appeals. S.Ct. Rule 10. The parties here agreed that the ESPP issues in *Vizcaino I* and *II* were governed by Washington State law. *Vizcaino I* at 1196 (A105); *Vizcaino II* at 1014 (A64). This Court denied certiorari in 1998 when Microsoft previously sought review of these *same* Washington law issues

concerning the ESPP. No. 97-854, 118 S.Ct. 899 (1998).[16] Now, after the Ninth Circuit enforced and reiterated some aspects of those same decisions under Washington law in *Vizcaino III*, Microsoft disregards Washington law and urges the Court to create a *federal common law* of employee benefits to override state law.[17]

Microsoft argues there should be some sort of federal common law of employee benefits contracts that "restor[es] order to the law of employee benefits" (evidently for the computer industry in particular). Pet., pp. 4 and n. 2, 24-27. Microsoft contends there needs to be a common federalized "order" for all employee benefit cases, including this contract case under Washington common law, to provide, among other things, for "orderly resolution" of two cited pending district court ERISA cases. Pet., pp. 4 n. 2 and 24-27.[18] Microsoft's position is contrary to *Erie*

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[16] The Petition for Certiorari and the Respondents' Brief in Opposition in No. 97-854 discuss the Washington State law issues presented in *Vizcaino I* and *II*.

[17] Microsoft argues that *Vizcaino III* dealt with the merits of ERISA claims governed by federal law, as well as ESPP claims governed by Washington state law. Pet. p. 12. This is incorrect because *Vizcaino II* remanded ERISA claims to the plan administrator (A63, A66), and those claims were further remanded by the district court on Feb. 13, 1998 (1998 WL 122084, p. 4). The plan administrator did not complete review until Sept. 28, 1999.

[18] Microsoft cites two pending district court cases in New York and Los Angeles as the reason why this Court should review the merits of the Washington common law issues in *Vizcaino III*. Pet. 4 n. 2. Both cited cases are ERISA cases at a very early stage, *e.g.*, *Herman v. Time-Warner*, 56 F.Supp.2d 411

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Railroad v. Tompkins, 304 U.S. 64 (1938), which held there can be no federal common law governing such claims arising under state law and the federal courts will apply state law to state law claims such as those here.

Microsoft further contends that the Ninth Circuit was wrong in relying on IRS employee status determinations for several positions to create a presumption of employee status for workers in those IRS-reclassified positions, thereby shifting the burden of proof to Microsoft to establish any exceptions. Pet., pp. 11, 20, 25. This is, first of all, exactly what Microsoft agreed to. The IRS determinations covered job classifications, not individuals.[19] Microsoft

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(S.D.N.Y. 1999). Microsoft does not explain how this Court's decision on the Washington common law of contracts could affect those ERISA cases, nor does it even try to show how its proposal for a federal common law of non-ERISA state law contractual employee benefits would cause an "orderly resolution" of cases under ERISA. It certainly does not propose any compelling reason to overrule *Erie Railroad v. Tompkins*.

[19] The 1989 Internal Revenue Service examinations of certain types of Microsoft workers determined common-law employee status based upon job *positions*, stating for example:

> As a result of our Federal Employment Tax examination, we have determined that services performed for Microsoft *by an individual in the position commonly referred to as* "Formatter" constitute an employer-employee relationship. This determination is *based on information received from Microsoft and on information received from a representative sampling of the workers in that job position* . . .
>
> *This determination covers the employment position* named in the first paragraph of this letter *and all*

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expressly accepted these findings, agreeing to "review other *job positions* to insure compliance." CR 444, p. 004195. Moreover, Microsoft agreed in this case that these workers were "generally" employees of Microsoft. *Vizcaino I* at 1193 n. 4 (A96); *Vizcaino II* at 1010 (A53); *Vizcaino III* at 722 (A18). The burden was thus correctly placed on Microsoft in *Vizcaino I* at 1193 n. 4, 1200 (A96, A113-A114), which this Court declined to review. 118 S.Ct. 899 (1998). In light of Microsoft's general concessions, placing the burden on Microsoft to prove specific exceptions is both logical and consistent with the rule that a class action defendant that has been found responsible for a pattern and practice of conduct must prove any specific exceptions. *Cf. Internat'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 359 (1977). Nevertheless, following remand, the Workers also submitted extensive uncontroverted evidence in support of summary judgment as to the common-law employee status of the IRS-reclassified job positions at Microsoft. Microsoft neither controverted nor rebutted that evidence. Thus, consistent with Rule 56 and *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), the Ninth Circuit was correct in its determinations that the workers in Microsoft's IRS-reclassified positions are entitled to participate in the ESPP.

> *differently named positions that are substantially similar in nature*. This determination pertains to all tax periods beginning after December 31, 1985. (Emphasis added.)

"Formatter" is but one of the *positions* reviewed by the IRS, and is used here for purposes of explaining the IRS approach to determining common-law employee status by *position*. CR 444, p. 004298. The panel decision in *Vizcaino I* at 1190 n. 2 (A91) quoted this language from the IRS letters.

Microsoft's argument that the Workers are seeking double benefits (from Microsoft and its payroll agencies) is groundless; plaintiffs are seeking Microsoft employee benefits to which they are entitled, under governing Washington State law, by the explicit terms of Microsoft's plan. *Vizcaino II* at 1014 (A63-A65); *Vizcaino I* at 1196-97 (A105-A108). Microsoft "payrolled" the workers through agencies to *deny* them employee benefits, *not* to give them "benefits" through its payroll agencies. *Vizcaino I* at 1191 (A91-A92). There is *no* record evidence that an employee of Microsoft (as the Workers are) could obtain duplicate ESPP benefits through the payroll agencies, nor is there any record evidence that the payroll agencies offer any such benefit. All that the Ninth Circuit said (A19), as a subsidiary alternative point, was that, *hypothetically*, "[e]ven if" Microsoft could somehow push the Workers into some kind of employment relationship with the agencies by payrolling the Workers through these "paymaster" agents, as they are defined in Washington law, see *Rho Co. v. Dep't of Revenue*, 782 P.2d 986, 992-93 (Wash. 1989), this would not destroy the Workers' common-law employee status at Microsoft. *Vizcaino III* at 723 (A19-A20).

For this subsidiary alternative point, the Ninth Circuit cited Washington law and tax law cases, including tax law principles which were expressly incorporated into the ESPP by Microsoft. *Vizcaino I* at 1196-97; *Dopps v. Alderman*, 121 P.2d 388, 391 (Wash. 1942) (federal statute affecting "construction" of contract is incorporated into and "becomes a part" of the contract, under Washington contract law); *Boggs v. Whitaker*, 784 P.2d 1273, 1274-75 (Wash.App. 1990). This point is also consistent with general common law principles. *NLRB v. Town & County Elec.*, 519 U.S. 85, 94-95 (1995).

Finally, Microsoft's allies in the *amici* brief of ITAA *et al.* propose some sort of federal common law to override Washington law, based on the tax law concept of "leased employees." Aside from running directly against this Court's instructions in *Erie Railroad, supra,* that there is no federal common law for state law claims, there are no "leased employees" in this case. Common-law employees of Microsoft, members of the class here, cannot by definition also be "leased employees" of Microsoft at the same time. *Burrey v. Pacific Gas & Elec.*, 159 F.3d 388, 393 (9th Cir. 1988); 26 USC § 414(n)(2).

CONCLUSION

The petition does not establish any compelling reasons to review the court of appeals' enforcement of its own mandate based on Washington State law, particularly where review of that mandate itself was previously denied. 118 S.Ct. 899 (1998). The petition should be denied.

DATED: November 19, 1999.

Respectfully submitted,

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